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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Justin Lane,

10 Plaintiff,

11 v.

12 City of Tucson, et al.,

13 Defendants.
14

No. CV-22-00394-TUC-BGM

ORDER

15 Before the Court is Defendant's Motion for Reconsideration. (Doc. 73.) The
16 motion has been fully briefed. (Docs. 77, 78.) For the reasons that follow, Defendant's
17 motion is denied.

18 **BACKGROUND**

19 On January 2, 2025, the Court issued an Order granting in part and denying in part
20 Defendant's summary judgment motion. (Doc. 72.) Plaintiff Justin Lane had brought three
21 constitutional claims against four Defendants alleging that he was unlawfully demoted
22 because of his protected speech and that his unlawful demotion violated his Fourteenth
23 Amendment procedural due process liberty and property interests. (See Doc. 1-3 at 30-
24 35.) The Court concluded that Plaintiff's First Amendment retaliation claim against all
25 Defendants and his Fourteenth Amendment property interest claim against the city of
26 Tucson survived summary judgment. (Doc. 72 at 29-30.) The Court offered an extensive
27 analysis supporting its determination that Plaintiff testified in front the civil service
28 commission in his capacity as a private citizen. (Doc. 72 at 14-16.) It ruled, in part:

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There is sufficient evidence in the record that demonstrates that Lane was not testifying pursuant to his official duties when he appeared before the civil service commission on behalf of a terminated police officer. Lane's day-to-day captain duties included reviewing internal investigations into alleged incidents of officer misconduct and leading a division within the police force, but there is no evidence to suggest that they also included testifying on behalf of a terminated officer at his appeal hearing. The fact that the testimony was provided to an entity outside of Lane's chain of command and was given against the explicit admonition of Chief Magnus also indicates that the testimony was given in a private rather than public capacity.

....

In reversing the district court's summary judgment ruling in the president's favor, the Court observed that "[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes even when the testimony relates to his public employment or concerns information learned during that employment." *Id.* at 238. The Court explained that sworn testimony in a judicial proceeding is a "quintessential example of speech as a citizen" because "[a]nyone who testifies in court bears an obligation, to the court and society at large, to tell the truth." *Id.* The Court ruled that any separate obligation as an employee, such as showing up to court dressed in a professional manner, is separate from the obligation to speak the truth and that such obligation renders sworn testimony speech as a private citizen. *Id.* at 239.

In the context of *Lane* and under the guiding principles promulgated by *Dahlia v. Rodriguez*, 735 F.3d 1060, 1072-73 (9th Cir. 2013), this Court concludes that Lane's civil service commission testimony was provided in his capacity as a private citizen and is protected. It is an undisputed fact that the civil service commission hearing at which Lane testified concerned a termination appeal by the officer that Lane described in his memo and report as comporting with the department's use-of-force policy. (Docs. 61, DSOF 63; 66 at 3.) It is also an undisputed fact that *the officer* requested that Lane be subpoenaed to testify at the hearing, which then prompted the City to issue its memorandum to Lane. (Docs. 66, PSOF ¶¶ 28-30, 50; 68 at 2.) It is irrelevant to the Court's analysis whether Lane's testimony "relate[d] to his public employment or concern[ed] information learned during that employment." 573 U.S. at 238. Rather, the critical question is whether Lane's testimony "is itself ordinarily within the scope of [the] employee's duties, not whether it merely concerns those duties." *Id.* at 240.

1 The fact that Lane affirmed defense counsel’s leading deposition
2 question that he appeared before the civil service commission in his “capacity
3 as a TPD lieutenant for the police department” fails to adequately support
4 Defendants’ proposition that Lane testified in his official capacity as a matter
5 of law. *See Garnett v. ADT LLC*, 139 F. Supp. 3d 1121, 1125 (E.D. Cal.
6 2015) (ruling that statements based on improper legal conclusions are not
7 *facts* and can only be considered as arguments on a motion for summary
8 judgment). Additionally, while Defendants proffer a TPD general order
9 concerning court attendance and interviews, the order fails to demonstrate
10 that department employees must *testify* at civil service commission hearings
11 or show that commission attendance and testimony are part of a captain’s
12 official duties. (*See* Doc. 61-2 at 81 (“*Attendance* at such a hearing is
mandatory for any employee who is duly notified.”) (emphasis added));
13 *Garcetti*, 547 U.S. at 425 (“[T]he listing of a given task in an employee’s
written job description is ... no[t] sufficient to demonstrate that conducting
14 the task is within the scope of the employee’s professional duties for First
15 Amendment purposes”).

16 Finally, the transcript of Lane’s civil service commission testimony
17 spans over ninety pages and includes references to Lane’s position that the
18 terminated officer’s use of force was justified and within department policy,
19 his responses to hypothetical use-of-force scenarios, and Lane’s
20 controversial opinion that the officers in the incident were not afforded the
21 necessary guidance, leadership, and tools to be expected to accomplish their
22 mission. (*See* Doc. 61-3 at 13-48, 50-57, 71-72, 78-94.) This testimony goes
23 well beyond Lane’s “opinion that the officer did not violate the policy” and
24 “should not be disciplined.” (Doc. 60 at 7.) As such, Lane’s civil service
25 commission testimony was provided as a private citizen, and Defendants’
26 summary judgment motion on the issue is denied.

27 (*Id.*)

28 On January 16, 2025, Defendants filed their motion for reconsideration asserting the
Court committed “manifest error” in its speech as a private citizen determination because
the Court “overlooked” or “misapprehended” facts directly related to the scope and content
of a plaintiff’s job responsibilities. (Doc. 73 at 3.) With the Court’s permission, Plaintiff
filed his response on February 12, 2025, (Doc. 77); and on February 19, 2025, Defendants
filed their reply, (Doc. 78). This Order follows.

LEGAL STANDARD

The District of Arizona’s Local Rules of Civil Procedure provide an avenue for reconsideration motions. LRCiv 7.2(g). The Local Rule states:

The Court will ordinarily deny a motion for reconsideration of an Order absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence. Any such motion shall point out with specificity the matters that the movant believes were overlooked or misapprehended by the Court, any new matters being brought to the Court’s attention for the first time and the reasons they were not presented earlier, and any specific modifications being sought in the Court’s Order. No motion for reconsideration of an Order may repeat any oral or written argument made by the movant in support of or in opposition to the motion that resulted in the Order. Failure to comply with this subsection may be grounds for denial of the motion.

LRCiv 7.2(g)(1).

Additionally, a motion for reconsideration “may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.” *Kona Enters, Inc. v. Est. of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Nor is reconsideration to be used to ask the court to rethink what it already thought through. *United States v. Rezzonico*, 32 F. Supp. 2d 1112, 1116 (D. Ariz. 1998). “Ultimately, a party seeking reconsideration must show more than a disagreement with the Court’s decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party’s burden.” *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 649 F. Supp. 2d 1063, 1070 (E.D. Cal. 2009) (internal quotation marks and citation omitted). “Arguments that the court was in error on the issues it considered should generally be directed to the Court of Appeals.” *Rezzonico*, 32 F. Supp. 2d at 1116.

DISCUSSION

Defendants assert the Court committed manifest error by determining that Lane’s civil service testimony was provided in his capacity as a private citizen rather than pursuant

1 to his official job duties. (Doc. 73 at 2.) To support their assertion, Defendants argue (i)
 2 there is undisputed evidence that proves TPD officers know that they may be called to
 3 testify on behalf of an appealing employee; (ii) the content of the city of Tucson's
 4 memorandum supports a determination that Plaintiff's testimony was within the scope of
 5 his ordinary duties; and (iii) TPD General Order 3818 dictates that Plaintiff was testifying
 6 in his official capacity. (*Id.* at 3-8.) These arguments require the Court to rethink what it
 7 already thought through or to consider arguments for the first time when they could
 8 reasonably have been raised earlier in the litigation. Accordingly, Defendants fail to
 9 demonstrate "manifest error," and their motion for reconsideration is denied.

10 **I. Defendants Fail to Demonstrate Manifest Error**

11 "Manifest error is, effectively, clear error." *Teamsters Loc. 617 Pension & Welfare*
 12 *Funds v. Apollo Grp., Inc.*, 282 F.R.D. 216, 231 (D. Ariz. 2012) (citing *Ybarra v.*
 13 *McDaniel*, 656 F.3d 984, 998 (9th Cir. 2011)); *see also* 389 *Orange St. Partners v. Arnold*,
 14 179 F.3d 656, 665 (9th Cir. 1999) ("[A] motion for reconsideration should not be granted
 15 ... unless the district court is presented with newly discovered evidence, committed clear
 16 error, or if there is an intervening change in the controlling law."). "Clear error occurs
 17 when the reviewing court on the entire record is left with the definite and firm conviction
 18 that a mistake has been committed." *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 955
 19 (9th Cir. 2013) (internal quotation marks and citation omitted). "A manifest injustice is
 20 defined as an error in the trial court that is direct, obvious, and observable." *de Borja v.*
 21 *Razon*, 340 F.R.D. 400, 409 (D. Or. 2021).

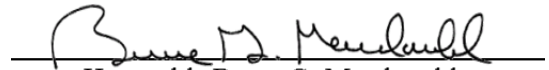
22 Here, the record fails to reflect that the Court committed clear error in its speech as
 23 a private citizen determination. Defendants' curt and conclusory summary judgment
 24 argument that Plaintiff failed to establish that he testified as a private citizen was three
 25 sentences long. (*See* Doc. 60 at 8:12-17.) Defendants argued:

26 In this case, Lane's speech only existed because TPD commissioned
 27 it pursuant to its policies and procedures that require that a TPD supervisor
 28 review OPS investigations and recommend discipline when appropriate. (See
 DSO 9-11, 14, 18, 23-28, 30-43). Lane has admitted that his written

1 materials and his testimony before the City Civil Service Commission were
2 done in his official capacity, and not as a private citizen. This is not a disputed
3 fact. (DSOF 52-65, 67).

4 As previously mentioned, the Court gave this argument careful consideration, which
5 included elucidating the proper legal standards by which protected speech is analyzed. (*See*
6 Doc. 72 at 10-12, 14-16.) The Court was unconvinced by Defendants' conclusory and
7 contradicted assertions and gave its reasoning in a clear and concise manner. (*See id.* at
8 15-16.) The arguments at hand are an attempt by Defendants to relitigate an issue that has
9 been thoroughly addressed.¹ As such, Defendants motion for reconsideration is denied.

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11 Dated this 4th day of March, 2025.

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14 Honorable Bruce G. Macdonald
15 United States Magistrate Judge
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25 ¹ To the extent that Defendants also request that the Court reconsider its First Amendment
26 qualified immunity ruling, their request is denied for identical reasons. Defendants fail to
27 argue, much less establish, that the Court committed clear error in its qualified immunity
28 analysis. (Doc. 73 at 6-7.) Rather, Defendants base their arguments on ones previously
considered, (*see* Doc. 60 at 15:13-19), and a new argument that goes to the merits of the
qualified immunity analysis that they failed to raise, but could have, in their summary
judgment motion, (*see id.* at 14-15). As such, this request is also denied.